89-82

No.

Supreme Court, U.S.
FILED
JUL 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JAMES C. RAYNER,

Petitioner,

v.

DANIEL W. SMIRL

AND

CSX CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did Congress intend to preempt state tort law remedies for abusive employer conduct when in 1980 it added whistleblower protection for railroad workers to the Federal Railroad Safety Act of 1970, 84 Stat. 791?

2. Do the employee protections in the Federal Railroad Safety Act, which are enforced by the Railroad Adjustment Board comprised equally of union and management representatives, apply to railroad "officers" who are exempt from union representation?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, James C. Rayner respectfully prays that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on April 21, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 873 F.2d. 60 and appears in the Appendix hereto. The opinion of the District Court is reported at 687 F. Supp.

993 and appears in the Appendix hereto.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on April 21, 1989. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Art. IV, P.2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Code, Title 45:

§441. Protection and rights of employees

(a) Filing of complaints; institution of proceedings; testimony

A common carrier by railroad engaged in interstate or foreign commerce may not

discharge or in any manner discriminate against any employee because such employee, whether acting in his own behalf or in a representative capacity, has-

(1) filed any complaint or instituted or caused to be instituted any proceeding under or related to the enforcement of the Federal railroad safety laws; or

(2) testified or is about to testify in any such proceeding.

...

(c) Resolution of disputes

(1) Any dispute, grievance, or claim arising under this section shall be subject to resolution in accordance with the procedures set forth in section 153 of this title.

(2) In the case of any violation of subsection (a) or (b) of this section, the Adjustment Board (or any division or delegate thereof) or any other board of adjustment created under section 153 of this title shall, where appropriate, award backpay to the aggrieved employee and order such employee reinstated to his

position.

(d) Election of remedies

Whenever an employee of a railroad is afforded protection under this section and under any other provision of law in connection with the same allegedly unlawful act of an employer, if such employee seeks protection he must elect either to seek relief pursuant to this section or pursuant to such other provision of law.

STATEMENT OF THE CASE

James C. Rayner, the Petitioner, has worked for CSX Corporation and its predecessors since December 1967. For twelve years, he was a locomotive fireman and locomotive engineer. In April 1979, he was promoted to the position of road foreman of engines and was assigned to the Baltimore area. At that point, he became an at-will employee of CSX exempt from union jurisdiction. Between 1984 and 1987, the petitioner observed and complained to his superiors about several

safety violations in the CSX system. As a result, he became known as a "whistleblower" who refused to overlook serious rules infractions, and was told by his superiors that he should learn to "get along" with the people around him. In 1987, Rayner was removed from his position as a road foreman and was demoted to locomotive engineer and transferred to Youngstown, Ohio.

In January 1988, petitioner filed suit in the Circuit Court for Baltimore City alleging that he was reassigned and demoted in retaliation for his complaints about safety violations in the operation of the railroad. He sought remedies for abusive discharge under the Maryland common law as set out in Adler v. American Standard Corporation, 291 Md. 31, 432, A2d 646 (1981). Defendants removed the action to the United States District Court for the District of Maryland on the contention that petitioner's state law claim was preempted by the Federal Railroad Safety Act of 1970, 45 U.S.C. §§421-44, as amended, (FRSA). Defendants then moved to

dismiss the complaint asserting, among other things, that the sole remedy under the FRSA for the conduct complained of was under the jurisdiction of the National Railroad Adjustment Board. The District Court dismissed the complaint holding that the state law claim was preempted and that jurisdiction rested with the National Railroad Adjustment Board. A timely appeal was taken to the United States Court of Appeals for the Fourth Circuit which affirmed the judgment of the District Court.

ARGUMENT

This case is one of first impression on two important areas of federal railroad law: (1) Did the 1980 addition of whistleblower protections to the Federal Railroad Safety Act of 1970, 84 Stat. 971, (FRSA) deprive the states of the power to provide common law protection to railroad workers?, and (2) Does the Railroad Adjustment Board, comprised equally of representatives of railroad unions and

railroad management, have jurisdiction to hear a case involving a supervisory worker exempt from union jurisdiction?

The answer to the first question has double impact since it affects initially the federal court's jurisdiction over this case under the "well-pleaded complaint" rule as well as the substantive disposition of this complaint which seeks remedy only under state common law.

I. The Federal Railroad Safety Act does not preempt state common law protection of employees from abusive conduct of their employers.

The Federal Railroad Safety Act, while it sets a nationwide standard for safety related regulation of railroads, does not preempt state common law protection of railroad workers in their employer-employee relations. Here, petitioner seeks redress under state tort common law for an abusive act of his employer. Adler v. American Standard Corp., 291 Md. 31, 432 A.2d 464 (1981). Although the courts below found the FRSA expressly preempts the Adler remedy, their

error came from too broad a reading of what Congress intended to reserve as an exclusive national preserve when it passed the FRSA. The decision below is also inconsistent with other federal and state court decisions on the preemptive effect of federal whistleblower protests.

In order for a federal law to preempt state law under the supremacy clause, U.S. Const. Art. IV, P.2, there must be a clear intent on the part of congress to preempt. Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947). That intent may be either expressed in the act itself or implied by the actions of Congress. In this case, there is neither express nor implied preemption of the state common law remedy sought by petitioner. In fact, the two sections of the statute covering its relationship to other statutes and regulatory schemes — make clear that congress did not intend to preempt state law remedies available to employee whistleblowers.

The principles under which preemption will be found have been clear for sometime

and were recently summarized by this court:

> Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, Jones v. Rath Packing Co., 430 U.S. 519, 97 S. Ct. 1305, 51 L.Ed. 2d 604 (1977), when there is outright or actual conflict between federal and state law, e.g., Free v. Bland, 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d. 248 (1963), where there is implicit in federal law a barrier to state regulation, Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 103 S. Ct. 2890, 77 L.Ed. 2d 4900 (1983) where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947), or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. Hines v. Davidowitz, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941).

Louisiana Public Service Comm. v. F.C.C., 476 U.S. 355, 368-69, (1986). In addition, preemption may result when a federal agency acts "within the scope of its congressionally delegated authority." Id. However, none of these seven

recognized methods of preemption are present here.

The FRSA came into being as a result of the status of safety on the nation's railroads in the 1960s. 1970 U.S. Code Cong. and Adm. News 4104. It provides a broad scheme for federal regulation of rail safety and, admittedly, calls for a uniform national system of safety standards for railroads. Section 205 of the Act, now codified at 45 U.S.C. §434, provides that "railroad safety shall be nationally uniform to the extent practicable." But while the Congressional intent to achieve nationwide uniformity in the area of safety standards is clearly expressed in the act, there is nowhere a mention of any intent to mandate nationwide uniformity in the area of employee-employer relations. Section 434 itself contains a provision that allows for lack of uniformity even within the area of safety standards. It declares: "A state may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until

such time as the secretary has adopted a rule, regulation, order or standard covering the subject matter of such state requirement."

The very nature of the railroad business reveals the policy reasons for mandating uniformity in safety standards. A railroad should not be expected to comply with a series of successive technical regulations as its trains roll form one state to another. However, what is at issue here is very different from technical safety regulations. This case involves a state created tort remedy of broad and general application to all employers and employees in the state. It is particularly important that the remedy be available here, since at the time of the conduct in question, petitioner was a supervisory employee exempt from the protections of union membership and the Railway Labor Act.

What is at issue here is whether the FRSA preempts state (and other) remedies that railroad workers may have against employers who engage in abusive conduct.

Petitioner concedes that the Act is preemptive as to the establishment or safety rules and standards. It is so because §434 says so; and it is so because Congressional acts and federal regulation have so occupied the field of railroad safety rules and standards that there is little or no room for state regulation. But when the area of employer-employee relationship is examined, neither express nor implied preemption can be found. Section 434, part of the statute as originally enacted in 1970 a decade before the whistleblower provision of §441 was inserted in the code, clearly speaks to safety standards and the like and not to the employer-employee relationship.

Section 441 itself provides the loudest testimony against preemption. Subsection (d) provides:

> Election of remedies
>
> Whenever an employee of a railroad is afforded protection under this section and under any other provision of law in connection with the same allegedly unlawful act of an employer, if such employee seeks protection he must elect either to

> seek relief pursuant to this section or pursuant to such other provision of law.

The petitioner has made just such an election by bringing his claim in state court seeking remedy under state law. The language of Subsection (d) is clear and unambiguous. It allows an employee of a railroad to choose between §441 remedies and protection "under any other provision of law." (Emphasis added) There is, therefore, no need to look beyond its plain language for its meaning, but if one is to look for interpretation, it is necessary to go to a source other than a committee report published many months before Subsection (d) was introduced, as the District and Circuit courts did.[1]

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[1]The district judge erroneously held that §441(d) was in the act only to require workers to elect between it and other remedies in the Railway Labor Act. App. 29, n.6. The section says no such thing and its history provides otherwise. It merely requires an employee to elect between his §441 remedy and any other remedy he may have "under any other provision of

Section 441(d) declares Congress's intent that remedies other than those molded in the FRSA be viable. The only published legislative history relevant to Subsection (d) comes in a floor discussion by Rep. Florio, who declared that the FRSA would not preempt remedies such as those under the Occupational Safety and Health Act. 126 Cong. Rec. H26532 (daily ed. Sept. 22, 1980) statement of Rep. Florio. The language of the act itself leads to the conclusion that Congress was giving workers the option to seek any available remedy but no more than one of them. If

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law." The district judge relied for his holding on a House report published on May 16, 1980, many months before the §441(d) language that eventually become part of the act was even proposed in Congress. At the time of the House Report, Subsection(d) was what is now Subsection (e). 1980 U.S. Code Cong. and Adm. News 3841. Current Subsection (d) came into the act on the floor of the House. 126 Cong. Rec. H 26532 (daily ed. Sept. 22, 1980) statement of Rep. Florio. The Circuit Court made the same error. App.16, n.1.

Congress had intended to limit railroad whistleblowers to the remedy provided in §441, then the language of §441(d), of necessity, would have been different. If Congress had intended to limit railroad whistleblowers to Federal statutory remedies, then the language of §441(d) should have been different.

Thus, when carefully read, the statute reveals that Congress did not express an intent to preempt state common law remedies for railroad whistleblowers.

Finding no express intent to preempt the field of remedies for railroad whistleblowers, one must next look for an implied intent to preempt under one of the principles set out in Louisiana Public Service Commission 476 U.S. at 368-69.

Preemption can occur "when there is outright or actual conflict between federal and state law," Id. at 368. Here there is no such conflict. What petitioner seeks is a state tort law remedy to redress improper conduct of his employer. This does not conflict with the federal law, which seeks to promote safe

railroads by setting uniform standards across the nation. There is no circumstance under which granting petitioner his state law remedy can be said to have "interfered directly with a legitimate exercise of the power of the federal Government...." Free v. Bland, 369 U.S. 663, 669 (1962).

Preemption can occur "where compliance with both federal and state law is in effect physically impossible," Louisiana Public Service Commission 476 U.S. at 368. That is not the case here. It is not only possible, but preferred that a railroad employer engaged in safety violations correct those violations as well as right any wrong it has inflicted upon its employee. Impossibility is simply not a consideration in this case. Likewise, preemption can occur "where there is implicit in federal law a barrier to state regulation," Id., and for the same reason, such is not the case here. Compliance with federal safety standards implies no barrier to compliance with state tort law.

Preemption can also occur "where congress had legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law," Id. Such is certainly not the case here. Congress has not legislated comprehensively nor otherwise in the field of employer-employee relations for at-will employees of railroads. The Railway Labor Act, 45 U.S.C. §151, et. seq. ("RLA"), does not apply to employees such as petitioner, who are not represented by a collective bargaining agent. Gorrill v. Icelandic/Flugleidir, 761 F.2d 847, 854 (1985) (Non-union pilots and engineers not covered by the RLA.) Petitioner here, at the time of the wrongs alleged, was a railroad "officer" and was not represented by a union. Certainly, §441 cannot be said to be a "comprehensive" legislative scheme to regulate employer-employee relations in the railroad industry, particularly in light of Subsection (d).

The lower courts are far from agreement on what constitutes preemption

by occupation of the field in an employer-employee relationship in a federally controlled safety area despite this court's pronouncement in Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1985). Since Silkwood, the highest court of one state and one federal trial court have held that even in an area as pervasively controlled as nuclear safety, Congress did not intend to, and therefore did not, preempt state tort remedies for abusive employer conduct. Wheeler v. Caterpillar Tractor Co., 108 Ill.2d 502, 485 N.E.2d 372 (1985), cert denied, 475 U.S. 1122 (1986); Stokes v. Bechtel North American Power Corp., 614 F. Supp. (D.C. Col. 1985); but see English v. General Electric Co., 683 F. Supp. 1006 (E.D. N.C. 1988), aff'd 871 F.2d 22 (4th Cir. 1989). The Wheeler court, in deciding if a whistleblower in a work site covered by the Nuclear Regulatory Act still had state tort law remedies, and relying on Silkwood, said "it was not inconsistent to vest the Nuclear Regulatory Commission with exclusive regulatory authority over the

safety aspects of nuclear development and at the same time permit the plaintiffs to recover for nuclear hazards", 108 Ill.2d at ____, 485 N.E. 2d at 376. (The Wheeler court also held that whistleblowers were protected whether their complaints were to their employers or to outside regulators. Id.)

Finally, preemption can occur from acts of a federal regulatory agency. There is no federal regulatory scheme here.

II. The Railroad Adjustment Board, comprised equally of representatives of railroad unions and railroad management, does not have jurisdiction to hear the case of a supervisory worker against his employer.

While Section 441 of the Federal Railway Safety Act requires that certain cases be heard by the Railway Adjustment Board (Board), it does not create new subject matter or personal jurisdiction for the Board. It has long been held that the Board does not have jurisdiction to hear disputes unless an interpretation of a collective bargaining agreement is

involved. Gorrill, 761 F.2d at 584. There is nothing in § 441 that appears to expand that jurisdiction of the Board. On its face, §441 purports to give the Board the power to hear cases involving any "claim arising under this Section," but if an employee brings a claim under some other provision of law, as allowed under Subsection (d), then the Board does not appear to be the proper place to bring the claim. The matter in this case is not a dispute under Section 441 and therefore does not belong before the Board for resolution.

Even if the Board were to have sole jurisdiction to hear claims of the type brought in this case, petitioner's claim, fits within one of the well recognized exceptions to that jurisdiction and jurisdiction in a court rather than in the Board would be appropriate.

It would be manifestly unfair to relegate disputes between union exempt employees and their employers to a Board that is hostile to such a claimant's position. The Board is comprised of an

equal number of members appointed by management and by unions representing workers within railway union jurisdiction. 45 U.S.C. § 153. Thus, one-half of the Board, the management side, would be inherently hostile to the position of the petitioner in this case, and the other half, appointed by unions, would be at best indifferent and, could also be deemed to be hostile toward an individual who was in a supervisory position over the workers represented by those Board members. The situation faced by petitioner here, although not as dire, is analous to that faced in Glover v. St. Louis-San Francisco Railway Co., 393 U.S. 324 (1969). In Glover, this court recognized the clear exception to the jurisdiction to the Board when "formal effort to pursue ... administrative remedies would be absolutely futule" Id. at 331. The Federal Courts have routinely recognized that the Board does not have jurisdiction in a case involving employees who are not represented under a collective bargaining agreement. Gorrill, 761 F.2d at 584.

Finally, the Board itself has routinely recognized that it does not have jurisdiction to act in cases where there is no collective bargaining agreement. See Altoff v. Maryland Midland Railway, Inc., Docket No. 43538, slip op, (National Railroad Adjustment Board, First Division, January 13, 1989) App. 34.

III. Conclusion

This court should grant the prayed Writ of Certiorari in order to resolve the question of the preemptive effect of federal laws providing protection for whistleblowers in industries highly regulated by the federal government and to resolve the question of whether the Railway Adjustment Board has jurisdiction to act in cases that involve non-union eligible employees.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-3130

JAMES C. RAYNER,

versus Plaintiff - Appellant,

DANIEL W. SMIRL;
CSX CORPORATION,

Defendants - Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. J. Frederick Motz, District Judge. (CA-88-0578-JFM).

Argued: January 11, 1989

Decided: April 21, 1989

Before ERVIN, Chief Judge, and MURNAGHAN and WILKINSON, Circuit Judges.

Kenneth J. Mackley (MACKLEY, GILBERT & MARKS; Charles Gerald Bernstein, BERNSTEIN, SAKELLARIS & WARD on brief) for Appellant. H. Russell Smouse (Kenneth D. Pack, MELNICOVE, KAUFMAN, WEINER, SMOUSE & GARBIS, P.A. on brief) for Appellees.

WILKINS, Circuit Judge:

The question here is whether the Federal Railroad Safety Act of 1970, 84 Stat. 971, as amended, 45 U.S.C. § 421-44, preempts a Maryland action for the wrongful discharge of a railroad employee who reports railroad safety violations of his employer. We hold that the federal "whistleblower" statute, 45 U.S.C. §441, and the comprehensive remedial provisions incorporated therein, 45 U.S.C. §§ 441(c) & 153, are the railroad employee's exclusive remedy and therefore preempt his state-law claim. We affirm the judgment of the district court dismissing the employee's state action without prejudice to any federal remedies available to him.

I.

James C. Rayner has worked for CSX Corporation and its predecessor corporations since December of 1967. He served CSX for twelve years as a locomotive fireman and locomotive engineer. In April of 1979, he was promoted to the position of road foreman of engines and was assigned to the Baltimore area. Although he became an at-will employee of CSX by virtue of this

promotion, he retained his seniority rights as a former union member.

Between 1984 and 1987, Rayner alleges that he observed several safety violations and reported them to his superiors at CSX. He asserts in his complaint that he was known as a "whistleblower" who refused to overlook serious rules infractions, and was told by his superiors that he should learn to "get along" with the people around him.

In 1987, Rayner was removed from his position as a road foreman. He now works for CSX as a locomotive engineer in Youngstown, Ohio. He alleges that CSX removed and reassigned him in retaliation for safety complaints about the operation of the railroad.

In January of 1988, Rayner filed suit in the Circuit Court for Baltimore City against CSX Corporation and Daniel W. Smirl, one of his supervisors, asserting a wrongful discharge action under Maryland law. Defendants removed the action to federal district court, claiming that Rayner's state claim was preempted by the Federal Railroad Safety Act (FRSA), 45 U.S.C. §§ 421-44. Defendants subsequently

moved to dismiss Rayner's complaint, asserting, inter alia, that Rayner's sole means of redress was a complaint to the National Railroad Adjustment Board pursuant to 45 U.S.C. §§ 441(c) & 153.

The district court found that Rayner's state claim for wrongful discharge was preempted by the FRSA and therefore properly removed to federal court. The district court granted defendant's motion to dismiss because Rayner failed to pursue the administrative remedies required by § 441. The action was dismissed without prejudice in order to allow Rayner to pursue the federal remedies available to him. See Rayner v. Smirl, 687 F. Supp. 993 (D. Md. 1988).

Rayner appeals.

II.

We must first review briefly the basic principles of jurisdiction as they pertain to the federal preemption of state law. Absent diversity of citizenship, the jurisdiction of the federal district courts is governed by the "well-pleaded complaint" rule. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987). Federal jurisdiction, in other words,

"exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." Caterpillar Inc. v. Williams, 107 S. Ct. 2425, 2429 (1987), citing Gully v. First Nat. Bank, 299 U.S. 109, 112-13 (1936). The plaintiff generally may avoid federal jurisdiction by relying exclusively on state law; the defendant generally cannot invoke federal jurisdiction by relying on the defense of federal preemption. Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 7-12 (1983).

The "complete preemption" doctrine is, however, an exception to the well-pleaded complaint rule. Id. at 22-24. Once an area of state law has been completely preempted, "any claim purportedly based on that preempted state law is considered, from its inception, a federal claim, and therefore arises under federal law." Caterpillar, 107 S. Ct. at 2430. If the FRSA provides Rayner an exclusive remedy, his state claim for wrongful discharge is preempted and removal was appropriate.

III.

Appellant argues that the Federal

Railroad Safety Act does not provide him a remedy and therefore has no preemptive effect. We disagree.

Amendments to the FRSA in 1980 afforded explicit protection to "whistleblowers." See Federal Railroad Safety Authorization Act of 1980, Pub. L. 96-423, § 10, 94 Stat. 1815 (1980) (codified at 45 U.S.C. § 441). The act now provides that:

> A common carrier by railroad engaged in interstate or foreign commerce may not discharge or in any manner discriminate against any employee because such employee, whether acting in his own behalf or in a representative capacity, has --
>
> (1) filed any complaint or instituted or caused to be instituted any proceeding under or related to the enforcement of the Federal railroad safety laws; or
>
> (2) testified or is about to testify in any such proceeding.

45 U.S.C. § 441(a).

Rayner argues first that § 441(a) does not speak to intra-corporate complaints and therefore does not provide him a remedy. We reject such a narrow construction of this federal remedial

provision. At the time of its passage in 1970, the FRSA was the "most comprehensive" rail safety legislation ever enacted by Congress. See H.R. Rep. No. 91-1194, 91st Cong., 2d Sess., reprinted in U.S. Code Cong. & Admin. News 4104, 4106. As with all safety legislation, the Act should be broadly construed to effectuate the congressional purpose. See Whirlpool Corp. v. Marshall, 445 U.S. 1, 13 (1980).

More specifically, § 441 of the FRSA was meant to protect railroad employees who are harassed, discriminated against, or discharged by their employers for reporting safety violations. See H.R. Rep. No. 96-1025, 96th Cong., 2d Sess., reprinted in 1980 U.S. Code Cong. & Admin. News 3830, 3840. Such "retaliatory actions by employers [were] not to be tolerated in the work place." Id. at 3832. Railroad employees would no longer "be forced to choose between their lives and their livelihoods." Id. In short, it was Congress' intent to protect all railroad employees who report safety violations. The distinction between intra-corporate complaints and those made

to outside agencies is therefore an "artificial" one. Rayner, 687 F. Supp. at 995. Both serve to promote rail safety and both are within the contemplation of § 441.

We also reject Rayner's contention that he is not an "employee" within the meaning of § 441(a) and is therefore without a federal remedy under the FRSA. All disputes arising under § 441 must be brought before the National Railroad Adjustment Board pursuant to the administrative procedures of the Railway Labor Act. See 45 U.S.C. §§ 441(c) & 153. The fact that Rayner was a railroad supervisor does not mean that the Board is without jurisdiction in his case. Rayner in fact misconstrues the relationship between the FRSA and the Railway Labor Act. The FRSA's incorporation of the RLA in § 441 is limited to the RLA's dispute resolution procedures. 45 U.S.C. § 441(c). The FRSA borrows the administrative complaint procedures of the National Railroad Adjustment Board, but not its definition of employee or necessarily its jurisdictional limitations. Congress intended the FRSA

to promote the safety of all those working in the national rail system. A more inclusive definition of employee is therefore warranted. See e.g., 29 U.S.C. § 652(6) ("employee" defined under the Occupational Safety and Health Act). See also Rayner, 687 F. Supp. at 995 n.4.

Neither the language nor the legislative history of § 441 distinguishes at-will employees such as Rayner from those working under collective bargaining agreements. It would, moreover, be anomalous to impute to Congress an intent to distinguish between these two categories of employees, each of which may allege the same retaliatory employer action for the same protected act. We thus decline to hold that an at-will employee is somehow not an employee under the Act. Section 441(c) plainly states that: "Any dispute, grievance, or claim arising under [§ 441] shall be subject to resolution in accordance with the procedures set forth in section 153 of this title." 45 U.S.C. § 441(c)(1) (emphasis added). The Railroad Adjustment Board has exclusive jurisdiction over disputes arising under § 441, Bostos &

Main Corp. v. Lenfest, 799 F.2d 795, 800 (1st Cir. 1986). It possesses the expertise on matters of railway safety and the capacity to protect Rayner's rights. We again construe the Act based on Congress' remedial intent and conclude that Rayner is an "employee" within the contemplation of § 441(a).

In sum, we hold that § 441 provides a broad federal remedy for railroad "whistleblowers." We refuse to narrow this federal remedial provision to allow appellant to pursue a state action in tort.

IV.

We next must determine whether Congress intended the federal remedy in § 441 to supersede state law in cases such as the present one. See Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947). We conclude that it did.

The Supremacy Clause, U.S. Const. art. VI, cl. 2, is the source of Congress' power to preempt state law. See Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 368 (1986). Whether a state cause of action is preempted in a particular case is a question of congressional intent.

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985). Congress' purpose is the "ultimate touchstone." Malone v. White Motor Corp., 435 U.S. 497, 504 (1978).

Congressional intent in the FRSA is clear. The statute includes an explicit preemption provision in which Congress declared that:

> laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary [of Transportation] has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. § 434. The legislative history

also emphasizes that railroad safety is better served by uniform federal action rather than "by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems." See H.R. Rep. No. 91-1194, 91st Cong. 2d Sess., reprinted in 1970 U.S. Code Cong. & Admin. News 4104, 4109. Railroad safety is therefore to be "nationally uniform to the extent practicable." 45 U.S.C. § 434. See also Donelon v. New Orleans Terminal Co., 474 F.2d 1108, 1112 (5th Cir. 1973).

Section 441 clearly is a law "relating to railroad safety" under § 434. It therefore has preemptive force in the instant case. The purpose of the Act is to reduce injuries to persons and damage to property caused by railroad accidents. See 45 U.S.C. § 421. See also H.R. Rep. No. 91-1194, 91st Cong. 2d Sess., reprinted in 1970 U.S. Code Cong. & Admin. News 4104, 4113. Section 441 furthers these goals by protecting railroad employees who report safety violations. Moreover, § 441 was enacted after the FRSA preemption provision. Congress therefore was aware of the FRSA's preemptive scope

when § 441 was added to the FRSA. Finally, Congress presumably believed that this statutory "whistleblower" provision was a law "relating to railroad safety" when it included it in the Federal Railroad Safety Authorization Act of 1980 and codified it in the United States Code under the title of "Railroad Safety." See Pub. L. 96-423, § 10, 94 Stat. 1815 (1980) (codified at 45 U.S.C. § 441). See also H.R. Rep. No. 96-1025, 96th Cong., 2d Sess., reprinted in 1980 U.S. Code Cong. & Admin. News 3830, 3830-33; Rayner, 687 F. Supp. at 996.

The comprehensive remedial scheme for aggrieved railroad employees provided in § 441 serves to confirm its preemptive scope. The parties may petition for a hearing before the National Railroad Adjustment Board and may be represented by counsel. An employee who prevails before the Board may seek enforcement of the Board's order in the federal district courts, and either party may petition the federal district courts for review of the Board's decisions. See generally 45 U.S.C. § 153. The specific remedies for wrongfully discharged workers are also set

forth. The Board may award backpay to aggrieved railroad employees and may order employers to reinstate discharged or demoted employees to their previous positions. See 45 U.S.C. § 441(c)(2). This specific remedial scheme illustrates a congressional intent that the FRSA remedy for railroad "whistleblowers" be exclusive. Cf. Pilot Life v. Dedeaux, 481 U.S. 41, 52-56 (1987). Neither the text nor the legislative history of § 441 indicates any desire by Congress to authorize remedies not included in the statute. The statute does not authorize the punitive damages that accompany many state tort recoveries, for example. The "'presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.'" Id. at 1556, quoting Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 147 (1985).

We also agree with the district court that the preemptive effect of § 434 is not limited to certain state safety standards as appellant contends. Rayner, 6887 F.

Supp. at 996. The FRSA preempts not just safety standards but many categories of potential state action. By its terms, the FRSA preemption provision applied to "laws, rules, regulations, orders, and standards relating to railroad safety." 45 U.S.C. § 434 (emphasis added).

In addition, Congress' desire for national uniformity in railroad safety practices clearly is implicated by Rayner's common law claims. In one sense, of course, all the trier of fact need do in a wrongful discharge action is determine the reason for the discharge. In another sense, however, Rayner's claim of wrongful discharge for "whistleblowing" is inextricably tied to the question of precisely what railroad safety practices he was blowing the whistle on. To the extent that the justifiable nature of the whistleblowing enters the calculus in wrongful discharge actions, railroad safety laws might be subject to an unpredictable medley of jury determinations, which Congress, in its quest for national uniformity under §434, sought to avoid.

In sort, appellant's state claim is

not saved from federal preemption merely because it sounds in tort. Other provisions of federal law which sound in tort, such as the Federal Employer's Liability Act, 45 U.S.C. § 51, also implicate railroad safety and possess their own preemptive effect. See Lancaster v. Norfolk & Western Ry., 773 F.2d 807, 812 (7th Cir. 1985).[1]

V.

Although the preemption provision in § 434 of the FRSA recognizes two exceptions, neither saves Rayner's state

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[1] Appellant contends that § 441 (d) grants him a choice of remedies and therefore permits him to pursue a state common law action for wrongful discharge. Congress' intent in enacting § 441, however, was simply to preserve existing protections and remedies under the Railway Labor Act, see H.R. Rep. No. 96-1025, 96th Cong., 2d Sess., reprinted in 1980 U.S. Code Cong. & Admin. News 3830, 3840. The section refers to federal statutes or regulations, not the common law remedies of the fifty states. Clearly, the purpose of the provision was not "to alter existing protection, but rather to put the prohibition of discrimination into statutory form." Id. See also Rayner, 687 F. Supp. at 996 n.5 Section 441(d) is therefore not a general election of remedies provision.

claim for preemption.

Under § 434, states generally remain free to address matters of railroad safety until preempted by federal action. See also H.R. Rep. No. 91-1194, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Admin. News 4104, 4109. Once the federal governmental acts, however, the FRSA normally preempts state regulation of that subject matter. See National Ass'n of Regulatory Utilities Comm'rs v. Coleman, 542 F.2d 11, 13 (3d Cir. 1976) (§ 434 evinces a "total preemptive intent" in those areas where the federal government has acted). In the present context, Congress has acted to protect railroad "whistleblowers" by statute. See 45 U.S.C. § 441. Appellant's state claim therefore does not qualify for the first statutory exception to FRSA preemption.

Rayner's action for wrongful discharge also is not saved by the second statutory exception to FRSA preemption which provides the states concurrent power to regulate railroad safety under certain conditions. In order to qualify for this exception, the state action must be necessary to eliminate or reduce an

"essentially local safety hazard"; cannot be incompatible with any federal measure; and must not unduly burden interstate commerce. See 45 U.S.C. § 434. See also H.R. Rep. No. 91-1194, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Admin. News 4104, 4117. Congress intended to allow states to respond to local situations which do not lend themselves to national uniformity. The Maryland wrongful discharge action, however, is not designed to remedy an "essentially local" safety hazard, is incompatible with the detailed remedial scheme in § 153, and largely duplicates the federal "whistleblower" remedy provided in § 441. The second statutory exception to FRSA preemption therefore does not apply. See Coleman, 542 F.2d at 14-15.

VI.

We hold that the "whistleblower" provision of the Federal Railroad Safety Act provides appellant a federal remedy for his employer's alleged retaliatory acts. Section 441 preempts his Maryland

cause of action for wrongful discharge, see 45 U.S.C. § 434, and this action was therefore properly removed to federal court. Appellant's claim is dismissed without prejudice for failure to pursue his federal administrative remedies. The judgment of the district court is hereby

AFFIRMED.

JAMES C. RAYNER * United States

v.

* District Court

DANIEL W. SMIRL,

et al. * D. Maryland

* Civ. No. JFM-88-578

* * * * * * * * *

June 16, 1988

OPINION

MOTZ, District Judge

Plaintiff, James C. Rayner, initially instituted this action in the Circuit Court for Baltimore City, asserting a claim for wrongful discharge under Maryland law. Defendants, CSX Corporation and Daniel W. Smirl (a CSX supervisor), removed the action to this Court on the ground that plaintiff has, in substance, asserted a claim under the Federal Railroad Safety Act of 1970 ("FRSA"), 45 U.S.C. Sections 421-44 (1982 & Supp. I

1983)[2] Defendants have now moved to dismiss or for summary judgment on the ground that plaintiff has not filed a claim with the Railroad Adjustment Board as required by Section 441(e) of the FRSA.

I.

The facts as alleged by plaintiff may be briefly stated. In December 1967 plaintiff was hired by the predecessor of CSX as a locomotive fireman. By April 1979, after several promotions, plaintiff had become a road foreman of engines. As such, he became an employee at will. On numerous occasions dating back to 1984, plaintiff learned of or observed what he perceived to be serious violations of established train operating rules and regulations on the railroad. He reported these violations to his superiors but they consistently rebuked him for his "whistle-

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[2]In his original complaint plaintiff named CSX Corporation, not CSX Transportation, Inc., as a party defendant. It is undisputed that CSX Transportation, Inc. is plaintiff's employer, and plaintiff is hereby given leave to amend his complaint to substitute CSX Transportation, Inc. for CSX Corporation as a defendant.

blowing" and admonished him that one must "get along with the people with whom one works." As a result of his complaints, plaintiff became quite unpopular with his supervisors and various retaliatory actions were taken against him. Eventually, he was terminated as a road foreman and was assigned to Newcastle, Pennsylvania, and then to Youngstown, Ohio where he is employed as an engineer. These assignments have caused great hardship to plaintiff because he and his family have for many years lived and established ties in Hagerstown, Maryland.

II.

Defendants contend that the FRSA provides a remedy for the wrongs alleged by plaintiff and that plaintiff's tort claim for wrongful discharge is therefore, as a matter of state law, preempted. See Chekey v. BTR Realty, Inc., 575 F.Supp. 715, 717-18 (D.Md.1983).[3] There is,

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[3]Defendants also assert, as a secondary position, that, assuming no preemption, plaintiff has failed to state a wrongful discharge claim because (1) he has not been discharged form his employ-

however, a related but separate issue which this Court must decide before determining whether it can reach the state law preemption question and which (if answered affirmatively) moots the state law question. This case was removed to this Court from the Circuit Court for Baltimore City. It was removable only if the FRSA is "so completely" preemptive that it converts plaintiff's wrongful discharge claim under state law into an action arising under federal law. See Metropolitan Life Insurance Co. v. Taylor, ____ U.S. _____, 107 S.Ct. 1542, 1546-47, 95 L.Ed.2d 55 (1987). Thus, the inquiry which must be made is whether, as a matter of federal preemption law, the FRSA provides an exclusive remedy to plaintiff

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ment with CSX, and (2) he has not alleged that he reported any safety violations outside the intra-corporate group. See Adler v. American Standard Corp., 830 F.2d 1303, 1306, (4th Cir. 1987). This Court need not reach these issues in light of its holding that plaintiff's wrongful discharge claim is federally preempted.

for his whistleblowing activities.[4]

It must first be determined, of course, whether the FRSA provides a remedy to plaintiff at all. 45 U.S.C. Section 441(a) (1982) provides as follows:

> A common carrier by railroad engaged in interstate or foreign commerce may not discharge or in any manner

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[4]Defendant contends that a reference made by plaintiff in the complaint to the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. Section 2011 (1982 & Supp. II 1984), constituted the assertion of a claim under federal law which provides a sufficient basis for removal. Quite obviously, plaintiff was not attempting to state a claim under VEVRAA since, as defendants have argued in their motion to dismiss, VEVRAA applies only to procurement contracts of at least $10,000 with the United States. Furthermore, plaintiff has now amended his complaint to drop any reference to VEVRAA and withdrawing any claim which might have been associated with it. In light of this amendment, even if the original complaint had provided a basis for removal, this Court would exercise its discretion to remand the case to the Circuit Court for Baltimore City if it was not finding (as it does) that the Federal Railroad Safety Act is preemptive. See Carnegie-Mellon University v. Cohill, ____U.S.____, 108 S.Ct. 614, 622, 98 L.Ed.2d 720 (1988).

> discriminate against any employee because such employee, whether acting in his own behalf or in a representative capacity, has-
>
> (1) filed any complaint or instituted or caused to be instituted any proceeding under or related to the enforcement of the Federal railroad safety laws; or
>
> (2) testified or is about to testify in any such proceeding.

[1] The question here presented is whether plaintiff's intra-corporate violation reports constitute the filing of complaints within the meaning of Section 441(a).[5] Legislative history provides no

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[5] Plaintiff also argues that he is not an "employee" within the meaning of Section 441(a). Plaintiff bases this argument upon the fact that under the Railway Labor Act he was a supervisory employee and therefore unprotected by that Act. However, the FRSA is separate and distinct from the Railway Labor Act; it merely borrows the RLA's administrative complaint procedure. The Occupational Safety and Health Act provides a closer analog to the FRSA, and OSHA defines "employee" as "an employee of an employer who is employed in a business of his employer which affects commerce." 29 U.S.C. Section 652(6)

specific guidance on this question. However, the general background of Section 441(a) is succinctly stated in the report of the House Committee on Interstate and Foreign Commerce:

> The Committee has been informed of many complaints over the years of harassment in situations where a worker notifies authorities of violations, testifies in safety proceedings or institutes an action against a railroad. According to these complaints, harassment includes but is not limited to, firing, verbal abuse, disproportionate dangerous assignments, and constant and unrelenting supervision. Such retaliatory actions by employers are not be be tolerated in the work place. Section 10 of the bill [45 U.S.C. §441 (1982)] provides protection for the rail worker under these circumstances. The legislation would forbid discrimination against an employee for, among other things, reporting such violations. Similarly, the legislation would forbid a railroad from discriminating against an employee who refused

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(1982). There is no reason not to construe the term "employee" as used in the FRSA just as broadly, in light of the remedial purpose of the Act.

> to work in hazardous conditions presenting an imminent danger of death or serious injury. The Committee strongly believes employees should not be forced to choose between their lives and their livelihoods.

H.R. Rep. No. 1025, 96th Cong., 2d Sess. [hereinafter House Rep.] 8, reprinted in 1980 U.S. Code Cong. & Admin. News 3830, 3832.

This statement strongly suggests a legislative intent that the section be read broadly in order to accomplish the purposes of the FRSA. As the allegations made by plaintiff in this very case demonstrate, a distinction between intra-corporate complaints and complaints made to outside officials would be an entirely artificial one. In either situation employees "should not" - in the language of the House Committee on interstate and foreign commerce - "be forced to choose between their lives and their livelihoods." Moreover, the second problem described in the House Committee Report which is addressed by Section 441(b)-forbidding a railroad from

discriminating against an employee who refuses to work under hazardous conditions-clearly relates to an intra-workplace environment. There is no reason to infer that Congress intended to prevent an employee from being forced to work in peril but not to confer upon him a remedy for complaining to his supervisors about safety conditions.

[2] To conclude that Section 441(a) confers a remedy upon an employee who files intra-corporate reports does not dictate the further conclusion that this remedy is an exclusive one. The recognition of a state wrongful discharge claim for reporting safety violations, complementary to the federal administrative remedy, would not create an "outright or actual conflict between federal and state law," make compliance with both laws "in effect physically impossible" or construct "an obstacle to the accomplishment and execution of the full objectives of Congress." See Louisiana Public Service Commission v. FCC, 476 U.S. 355, 368-69, 106 S.Ct. 1890,

1898-99, 90 L.Ed.2d 369 (1986) (citations omitted). Indeed, it could be argued that the existence of a state claim would further the federal interest in railroad safety beyond the administrative remedy provided by federal law.[6] Speculation is not required as to the Congressional intent, however. 45 U.S.C. Section 434 (1982) is conclusive on the point. It provides as follows:

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[6]45 U.S.C. Section 441(d) (1982) provides that, "[w]henever an employee of a railroad is afforded protection under this section and under any other provision of law in connection with the same allegedly unlawful act of an employer, if such employee seeks protection he must elect either to seek relief pursuant to this section or pursuant to such other provision of law." It might be argued that this section implies that a plaintiff may elect to bring a state common law action rather than assert his rights under Section 441. However, the legislative history makes clear that this provision was included only to assure that Section 441 did not displace the protections and remedies already accorded to many railroad employees under the Railway Labor Act. See House Rep. at 16, reprinted in 1980 U.S.Code Cong. & Admin. News, at 3840.

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary [of Transportation] has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

This language could not be more clear that the laws relating to national safety shall be "nationally uniform to the extent practicable." This language "expresses a clear intent to preempt state law," and it is therefore controlling under established principles governing federal preemption. See Louisiana Public Service Commission v.

FCC, supra, at 368-69, 106 S.Ct. at 1898-99; Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed. 2d 714 (1985).[7]

It might be argued that Section 434 should not be deemed to apply here because the reason for the uniformity which it imposes is to prevent inconsistent safety standards from state to state. However, by its terms this section does not apply simply to safety standards but to all "laws, rules, regulations, [and] orders...relating to railroad safety." That Section 441(a) is, within the contemplation of Congress, a "law relating to railroad safety" is established by its placement in the chapter of 45 U.S.C.

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[7]The express preemption language of Section 434 distinguishes the FRSA from the Atomic Energy Act and therefore makes plaintiff's reliance upon Wheeler v. Caterpillar Tractor Co., 108 Ill.2d 502, 92 Ill.Dec. 561, 485 N.E.2d 372 (1985), cert denied 475 U.S. 1122, 106 S.Ct. 1641, 90 L.Ed.2d 187 (1986), and Stokes v. Bechtel North American Power Corp., 614 F.Supp. 732 (N.D.Cal. 1985), misplaced.

entitled "Railroad Safety." Furthermore, to the extent that Section 434 is intended not to be comprehensive, it is expressly limited, and neither of the two exceptions which it contains-one relating to State requirements preexisting the enactment of Section 434 and the other to "essentially local" safety hazards-is applicable here. See Missouri Pacific Railroad Co. v. Railroad Commission, 833 F.2d 570, 573 (5th Cir.1987).

In summary, this Court finds that Section 441(a) of the FRSA does confer a remedy to a railroad employee, such as plaintiff, who allegedly has been subjected to adverse employment actions for making intra-corporate reports of safety violations. Further, the Court finds that, in light of the express language of Section 443, this remedy preempts, as a matter of federal law, any state remedy and that, therefore, in light of Congress's pervasive legislation in the field, this action was properly removed to this Court from the Circuit Court for

Baltimore City.[8] Accordingly, because it is undisputed that plaintiff has not filed a claim with the Railroad Adjustment Board as required by Section 441(c), this Court is without jurisdiction, and defendants' motion to dismiss is granted. A separate order to that effect is being entered herewith.

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[8]This Court is also of the view that, as a matter of state law, the existence of the remedy provided by Section 441(a) preempts plaintiff's wrongful discharge claim. See Chekey v. BTR Realty, Inc., supra, at 717-18. However, as indicated in the text above, this Court has no jurisdiction to decide that question unless the state law claim is federally preempted, and its finding that it has jurisdiction moots the question.

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

Award No. 23909

Docket No. 43538

89-1-M-2012

The First Division consisted of the regular members and in addition Referee David P. Twomey when award was rendered.

PARTIES TO DISPUTE: (Lawrence E. Altoff
(
(Maryland Midland Railway, Inc.

STATEMENT OF CLAIM:

"Allow Employee Laurence E. Altoff, all lost earnings, including 'Car Pay, 37 hours - 40 minutes Compensatory Time, Vacation etc. Health and Welfare Benefits, discipline removed from service record, and restoration to service with seniority unimpaired for having been unjustly dismissed, on approximately 19 August 1987.'"

FINDINGS:

The First Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the

employee or employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The record shows the Claimant was employed on April 6, 1986, in engine and train service and was dismissed on August 19, 1987, on the grounds his job performance was unsatisfactory.

The Claim before the Board is for reinstatement and pay for time lost. While there is considerable argument, on both sides, concerning the merits of the Carrier's decision to terminate Claimant, the Board finds that it must dismiss the Claim on jurisdictional grounds.

It is well settled that the jurisdiction on the Board is restricted by statute to disputes involving "the interpretation or application of labor

agreements." The record before the Board, however, reveals there is no Collective Bargaining Agreement in effect on this Carrier, and therefore, there are no Agreement rules to interpret or apply.

The Board has no alternative but to dismiss the Claim. For similar holdings, see Fourth Division Awards 4410, 4478, 4508, 4510 and 4548.

A W A R D

Claim dismissed.

National Railroad Adjustment Board

By Order of First Division